JAN 9 1998
CLERK

(3)

No. 97-581

In the Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
Petitioner,

v.

KEITH M. SCOTT,
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF CENTER FOR THE COMMUNITY INTEREST, ANTI-VIOLENCE PARTNERSHIP, JUSTICE FOR ALL, MARK KLAAS FOUNDATION FOR CHILDREN, NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, PAROLEWATCH, SAFE STREETS ALLIANCE, AND WOMEN AGAINST VIOLENCE AS AMICI CURIAE IN SUPPORT OF PETITIONER

Of Counsel
ROGER L. CONNER
Center for the Community Interest
Suite 800
919 18th Street, N.W.
Washington, D.C. 20006
(202) 785-7844

ANDREW N. VOLLMER
Counsel of Record
MICHAEL PLOTNICK
LYLE ROBERTS
TODD ZUBLER
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

January 9, 1998

35 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE COURT SHOULD DECIDE WHETHER THE SEARCH OF SCOTT'S RESIDENCE VIOLATED THE FOURTH AMENDMENT 6

II. THE POLICY OF THE BOARD AUTHORIZING WARRANTLESS, SUSPICIONLESS SEARCHES OF PAROLEES IS VALID UNDER THE FOURTH AMENDMENT BECAUSE IT IS REASONABLY RELATED TO LEGITIMATE PAROLE INTERESTS 9

A. The Court Should Evaluate Alleged Constitutional Infringements in Parole Programs Under the Standard It Applies to Prison Regulations and Policies 10

1. The Legitimate Interests Test Should Apply Because Community Supervision and Prison Have Similar Problems and Objectives 11

2. The Same Prudential Reasons That Led to the Adoption of the Legitimate Interests Test in the Prison Context Apply to Community Supervision Programs 15

B. The Legitimate Interests of Community Supervision Require Intensive Monitoring, Including Policies of Conducting Warrantless, Suspicionless Searches of Supervisees 16

1. The Court Should Adapt the Factors Used in Applying the Legitimate Interests Test in Prison Cases to Community Supervision Cases 17

2. Consideration of the Requisite Factors Demonstrates That a Policy Decision To Conduct Warrantless, Suspicionless Searches Is Reasonably Related to the Legitimate Interests of Community Supervision .. 19

C. The Warrantless, Suspicionless Search of Scott's Residence Satisfies the Legitimate Interests Test 24

III. EVEN IF THE COURT DOES NOT ADOPT THE LEGITIMATE INTERESTS TEST, THE SEARCH OF SCOTT'S RESIDENCE WAS REASONABLE UNDER THE FOURTH AMENDMENT 27

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

Amiss v. State, 219 S.E.2d 28 (Ga. 1975) 9
Bell v. Wolfish, 441 U.S. 520 (1979) 16, 24
Bennis v. Michigan, 116 S. Ct. 994 (1996) 3
Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1997) 8, 25
Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997), *petition for cert. filed* (U.S. Dec. 5, 1997) (No. 97-7023) 3
Frink v. Arnold, 842 F. Supp. 1184 (S.D. Iowa), *aff'd*, 43 F.3d 673 (8th Cir. 1994) 24
Gagnon v. Scarpelli, 411 U.S. 778 (1973) 7
Griffin v. Wisconsin, 483 U.S. 868 (1987) ..... *passim*
Hudson v. Palmer, 468 U.S. 517 (1984) 17
Johnson v. Rodriguez, 110 F.3d 299 (5th Cir.), *cert. denied*, 119 S. Ct. 559 (1997) 3
Kansas v. Hendricks, 117 S. Ct. 2072 (1997) 2
Lane v. Griffin, 834 F.2d 403 (4th Cir. 1987) 24
Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) 23
Mason v. State, 838 S.W.2d 657 (Tex. 1992) 9
Montana v. Egelhoff, 116 S. Ct. 2013 (1996) 3
Morrissey v. Brewer, 408 U.S. 471 (1972) 11
O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) ..... *passim*
Pennsylvania Bd. of Probation and Parole v. Scott, 60 U.S.L.W. 3385 (U.S. Nov. 26, 1997) 7
Procunier v. Martinez, 416 U.S. 396 (1974), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989) 11, 14
Schenk v. Edwards, 921 F. Supp. 679 (E.D. Wash. 1996) 24
Scott v. Pennsylvania Bd. of Probation and Parole, 668 A.2d 590 (Pa. Commw. Ct. 1995) 26
Scott v. Pennsylvania Bd. of Probation and Parole, 698 A.2d 32 (Pa. 1997) 8

TABLE OF AUTHORITIES—Continued

Page

State ex rel. Juvenile Dep't v. Rogers, 836 P.2d 127 (Or. 1992) 9
State v. Cross, 487 So. 2d 1056 (Fla. 1986) 9
State v. Lampman, 724 P.2d 1092 (Wash. 1986) 9
Thornburgh v. Abbott, 490 U.S. 401 (1989) 11, 18
Turner v. Safley, 482 U.S. 78 (1987) ..... *passim*
United States v. Davis, 932 F.2d 752 (9th Cir. 1991) 8
United States v. Giannetta, 909 F.2d 571 (1st Cir. 1990) 8
United States v. Hill, 967 F.2d 902 (3d Cir. 1992) 7

STATUTES

37 Pa. Code §§ 63.3, 63.5(a) 26
61 Pa . Con. Stat. § 331.23 (1996) 26

MISCELLANEOUS

Ed Barajas, *Community Justice: Bad Ways of Promoting a Good Idea*, Perspectives, Summer 1997 19
Ed Barajas, *Freeing the Invisible Giant*, State Gov't News, Aug. 1997 13
Karine Bland, *Arizona Tough on Child-Sex Offenders, New Law Allows Life Sentences*, Arizona Republic, Apr. 21, 1997 22
Boston's 'Magic' Formula, Boston Herald, Feb. 20, 1997 21
Bureau of Justice Statistics U.S. Dep't of Justice, *Correctional Populations in the United States*, 1995 (May 1997) 12, 13
Todd R. Clear & Anthony A. Braga, *Community Corrections, in Crime*, 421 (James Q. Wilson & Joan Petersilia eds., 1995) 20

TABLE OF AUTHORITIES—Continued

Page

Ronald P. Corbett et al., *Operation Night Light: An Emerging Model for Police-Probation Partnership, Invitation to Change: 1996 Better Government Competition on Public Safety* (1996) 21, 22
John J. Dilulio, Jr., *Reinventing Parole and Probation*, Brookings Rev., March 22, 1997 13
David Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449 (1997) .. 13, 21, 22
Mark A.R. Kleinman et al., BOTEC Analysis Corp., The Massachusetts Institute for a New Commonwealth, *Criminal Justice in Massachussets: Putting Crime Control First*, Oct. 1996 ..... 12, 14, 19
National Inst. of Justice, U.S. Dep't of Justice, *Impact of Systemwide Drug Testing in Multnomah County, Oregon* (June 1995) 20
Dale G. Parent et al., National Institute of Justice, U.S. Dep't of Justice, *Responding to Probation and Parole Violations*, July 1994 ..... 12, 21
Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, 75 Prison J. 479 (1995) ..... *passim*
Joan Petersilia and Susan Turner, *Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment*, May 1993 20
Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. Rev. 151 (1997) 12

No. 97-581

In the Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE
Petitioner,

v.

KEITH M. SCOTT
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF CENTER FOR THE COMMUNITY INTEREST, ANTI-VIOLENCE PARTNERSHIP, JUSTICE FOR ALL, MARK KLAAS FOUNDATION FOR CHILDREN, NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, PAROLEWATCH, SAFE STREETS ALLIANCE, AND WOMEN AGAINST VIOLENCE AS AMICI CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted in support of petitioner, the Pennsylvania Board of Probation and Parole. By letters filed with the Clerk of the Court, petitioner and

respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI

The Center for the Community Interest, a project of the American Alliance for Rights and Responsibilities, and eight other community and victims' rights groups file this brief as amici curiae ("CCI and the crime victim groups") in support of the Pennsylvania Board of Probation and Parole (the "Board"). CCI is a national non-profit public interest organization founded to provide a voice for localities and community groups on public safety and quality-of-life issues. CCI helps cities, states, and civic associations to develop and defend policies that strike a reasonable balance between the rights of the individual and the needs of the larger community, addressing issues such as school violence, injunctions to control gangs, drug-related crime in low-income housing, and restrictions on aggressive panhandling. In doing this, CCI has developed a nationally recognized expertise on legal issues affecting the safety and quality of life of communities.

CCI has participated in a wide range of public safety and quality-of-life cases before this Court and other courts throughout the country.[2] In addition, it has represented crime

---

[1] This brief was prepared in whole by the counsel listed on the cover. No person or entity, other than the amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Most recently, CCI, as the American Alliance for Rights and Responsibilities, participated as amicus curiae before this Court in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (defending civil commitment of (continued...)

victim groups in helping to sustain "Megan's Law" in the Second Circuit[3] and, in the Fifth Circuit, the right of crime victims to communicate with parole boards.[4]

CCI is extremely concerned that the decision of the Pennsylvania Supreme Court, if ratified by this Court, would dangerously restrict the ability of parole authorities across the country to supervise and monitor convicted criminals effectively and would thus compromise neighborhood safety. Moreover, as advocates for a reasonable and sensitive balance between individual liberties and public safety and strong believers in the goals of rehabilitation, CCI is concerned that the Pennsylvania court's decision will have the untoward effect of limiting the availability of parole for all offenders, including those who could be successfully reintegrated into the community.

CCI is joined as amici on this brief by eight anti-crime and victims' rights groups. The Marc Klaas Foundation for Children is a national non-profit group that is in the forefront of advocating child safety through education and public awareness programs. Mr. Klaas founded the group after the murder of his 12-year-old daughter, Polly, by a parolee. The National Organization of Parents of Murdered Children, Inc. provides emotional support to families and friends of homicide victims. Its programs include Parole Block, which

---

[2] (...continued)
certain dangerous sexual offenders); *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (supporting reasonable restrictions on criminal defenses available to drunk drivers); *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (defending asset forfeiture programs to control street prostitution).

[3] *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *petition for cert. filed* (U.S. Dec. 5, 1997) (No. 97-7023).

[4] *Johnson v. Rodriguez*, 110 F.3d 299 (5th Cir.), *cert. denied*, 118 S. Ct. 559 (1997).

has successfully campaigned to keep convicted murderers behind bars. ParoleWatch is a national non-profit program that utilizes the Internet to inform the public when violent felons are eligible for early release. The Safe Streets Alliance is a national organization that supports "truth in sentencing" laws and other measures to reduce violent crime.

The Anti-Violence Partnership is a non-profit organization that addresses violence in Philadelphia through victim services, crime prevention, and programs such as Families of Murder Victims and the Student Anti-Violence Education Program. Justice For All is dedicated to the support and promotion of crime prevention and public safety bills and the broadening of legal rights for the victims of sexual and violent crimes. Parents of Murdered Children of New York State, Inc. is a non-profit organization formed in 1983 by the parents of murder victims to protect the rights of victims of violent crimes. Women Against Violence is a non-partisan advocacy group for women crime victims devoted to research, education, and political action. As advocates for the victims of violent crime, many of whom have suffered at the hands of paroled offenders, the co-amici organizations share CCI's grave concerns about the implications of the Pennsylvania decision.

SUMMARY OF ARGUMENT

The warrantless, without reasonable suspicion ("suspicionless"), search of Scott's residence by parole officers pursuant to a consent condition of his parole raises an important Fourth Amendment issue that the Court should address. The Pennsylvania Supreme Court in this case and several other lower courts have held incorrectly that *Griffin v. Wisconsin*, 483 U.S. 868 (1987), establishes a reasonable suspicion standard for the constitutionality of searching a parolee's or probationer's residence. This issue is a matter of great significance to the day-to-day conduct of corrections authorities because the reasonable suspicion standard unnecessarily hampers the effectiveness of parole and probation ("community supervision") programs.

The legitimate interests test established by the Court in evaluating prison policies that allegedly infringe the constitutional rights of inmates should also be applied to parole policies. Community supervision is a variation on imprisonment and has become the primary means of punishing and monitoring criminals under sentence. Just as limitations on the constitutional rights of prisoners are justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security, appropriate limitations are justified in probation and parole systems by the need to deter recidivism, monitor rehabilitation, and maintain community security. A deferential standard of review for determining the constitutionality of official policies is needed in both contexts.

Community supervision systems have a substantial interest in closely controlling and monitoring parolees and probationers, including through the use of policies authorizing warrantless, suspicionless searches. Many probation and parole programs are premised on the need to conduct warrantless, suspicionless searches, and these programs have been successful in reducing recidivism and deterring crime. The consent condition in Scott's parole form and the suspicionless search of his residence were part of an official policy of the Pennsylvania parole system and, as the experience of other community supervision programs evidences, advanced the legitimate interests of that system.

The search of Scott's residence was therefore reasonable, and did not violate the Fourth Amendment. For those reasons, the Court should reverse the Supreme Court of Pennsylvania.

ARGUMENT

CCI and the crime victim groups urge the Court to reverse the decision of the Pennsylvania Supreme Court and hold that the search of Scott's residence by Pennsylvania parole officers was reasonable and did not violate Scott's Fourth Amendment rights. We first explain the significant legal and practical reasons why the Court should decide the Fourth Amendment issue. We then show that the Court should apply the legitimate interests test from cases in the prison area to evaluate whether parole or probation policies violate a parolee's or probationer's constitutional rights. Application of that test demonstrates that warrantless, suspicionless searches are reasonably related to the legitimate interests of community supervision systems and therefore are reasonable under the Fourth Amendment. Finally, we explain that, under the legitimate interests test, the search of Scott's residence did not violate the Fourth Amendment.

I. THE COURT SHOULD DECIDE WHETHER THE SEARCH OF SCOTT'S RESIDENCE VIOLATED THE FOURTH AMENDMENT.

The Court should address the Fourth Amendment issue and hold that the search by the Pennsylvania parole officers did not violate Scott's Fourth Amendment rights. That decision would dispose of the need to resolve the principal question presented in this case concerning the

application of the exclusionary rule in parole revocation hearings[5] and, as we now describe, would have significant nationwide legal implications and consequences for the day-to-day operation of state and federal parole and probation systems.[6]

The Court should address the Fourth Amendment issue because the Pennsylvania Supreme Court in this case and other state and federal courts are misapplying this Court's *Griffin* decision.[7] *Griffin* held that a warrantless search of a probationer's residence was reasonable within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation of a state's probation system, but many lower courts are reading *Griffin* to require that a search of a parolee, even one who consents to the search, must be based on reasonable suspicion to be reasonable under the Fourth Amendment.

---

[5] The Court specifically invited briefing on the Fourth Amendment issue. Its order granting certiorari raised the following question: "Must a search of parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to the search as a condition of his parole?" *Pennsylvania Bd. of Probation and Parole v. Scott*, 60 U.S.L.W. 3385 (U.S. Nov. 26, 1997).

[6] For purposes of the issues discussed here, parole and probation systems should be treated similarly. *See United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992) ("There is 'no constitutional difference between probation and parole for the purposes of the Fourth Amendment.'") (quoting *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991)); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973) ("Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole.").

[7] *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

For example, in this case, the Pennsylvania Supreme Court relied on one of its earlier decisions to determine that a suspicionless search of a parolee is not reasonable under the Fourth Amendment despite the existence of a consent to search as a condition of parole. The earlier decision cited *Griffin* and opinions of other state supreme courts construing *Griffin* to decide that a search of a parolee must be based on reasonable suspicion.[8] Two federal appeals courts reached the same conclusion.[9] This Court therefore needs to resolve the Fourth Amendment question in this case to eliminate the confusion among the lower courts about *Griffin* and the legal principles governing searches in community supervision programs.

This confusion would remain in many states even if the Court held that the exclusionary rule does not apply in parole revocation hearings. In these states, the state constitution requires revocation hearings to exclude evidence obtained in violation of the federal or state constitution.[10]

---

[8] *Scott v. Pennsylvania Bd. of Probation and Parole*, 698 A.2d 32, 36 (Pa. 1997) (applying *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997)). In *Williams*, the court said: "We believe that this 'middle ground' approach to warrantless searches pursuant to a signed parole agreement comports with the Fourth Amendment protection afforded to parolees by the United States Supreme Court in *Griffin* . . . and in our sister states." 692 A.2d at 1036-37 (citing *Williams v. State*, 902 S.W.2d 767 (Ark.), *cert. denied*, 116 S. Ct. 676 (1995); *Pena v. State*, 792 P.2d 1352 (Wyo. 1990); *State v. Johnson*, 748 P.2d 1069 (Utah 1987)).

[9] *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) ("The permissible bounds of probation search are governed by a reasonable suspicion standard."); *United States v. Giannetta*, 909 F.2d 571, 576 (1st Cir. 1990) (holding that search of probationer without reasonable suspicion "conflict[ed] with the dictates of *Griffin*").

[10] *See, e.g., State v. Cross*, 487 So. 2d 1056 (Fla. 1986); *Amiss v.* (continued...)

Thus, the Court should decide the Fourth Amendment issue to clarify that the search of Scott's residence was not impermissible under the United States Constitution and that the results of the search do not need to be excluded for that reason.

Finally, as we discuss in more detail below, the standard for applying the Fourth Amendment to community supervision systems is a matter of great significance to the day-to-day conduct of corrections authorities. Requiring reasonable suspicion as a basis for conducting a parole search, even when the parolee has consented to the search, unnecessarily hampers the effectiveness of community supervision programs and impairs law enforcement efforts.

II. THE POLICY OF THE BOARD AUTHORIZING WARRANTLESS, SUSPICIONLESS SEARCHES OF PAROLEES IS VALID UNDER THE FOURTH AMENDMENT BECAUSE IT IS REASONABLY RELATED TO LEGITIMATE PAROLE INTERESTS.

CCI and the crime victim groups urge the Court to hold that the Board's policy authorizing warrantless, suspicionless searches of parolees is constitutional. The Court should reach this holding by applying the legitimate interests test currently used to assess prison policies that allegedly infringe the constitutional rights of prisoners. Under this standard of review, a community supervision

---

[10] (...continued)
State, 219 S.E.2d 28 (Ga. 1975); *State ex rel. Juvenile Dep't v. Rogers*, 836 P.2d 127 (Or. 1992); *Mason v. State*, 838 S.W.2d 657 (Tex. 1992); *State v. Lampman*, 724 P.2d 1092 (Wash. 1986).

policy is constitutionally valid, and a search pursuant to the policy is reasonable under the Fourth Amendment, if it is reasonably related to legitimate community supervision interests. Warrantless, suspicionless searches of supervisees more than satisfy the reasonable relationship requirement because strict controls and effective monitoring systems are a crucial part of deterring recidivism by criminals under sentence, whether the sentence is being served within or outside of prison walls.

A. The Court Should Evaluate Alleged Constitutional Infringements in Parole Programs Under the Standard It Applies to Prison Regulations and Policies.

The Court should use the occasion of this case to apply to community supervision programs the legitimate interests test it uses to evaluate allegations that official conduct pursuant to a prison regulation or policy infringed an inmate's constitutional rights. In *Griffin*, the Court alluded to this possibility but did not decide whether the test should be applied to probation or parole regulations.[11] As we now describe, the same reasons and concerns that led the Court to adopt the legitimate interests test in the prison context apply equally in the parole and probation context.

---

[11] *Griffin*, 483 U.S. at 874 n.2.

1. *The Legitimate Interests Test Should Apply Because Community Supervision and Prison Have Similar Problems and Objectives.*

The Court's approach in prison cases, when an inmate alleges that a prison regulation or policy infringes a constitutional right, is to find that the regulation or policy "is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The legitimate interests test balances the need to protect the constitutional rights of prisoners with the recognition that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," which are "not readily susceptible of resolution by decree." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

For several reasons, the Court should apply the same approach to community supervision policies, such as the policy of conducting warrantless, suspicionless searches in this case, when a supervisee claims a constitutional infringement. First, the Court has always recognized that probation and parole are variations on imprisonment.[12] The similarity between community supervision and prison is reflected in the fact that probationers and parolees have only a conditional liberty interest dependent on observance of

---

[12] *Id.* at 874 ("Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea guilty' . . . .") (quoting G. Killinger et al., *Probation and Parole in the Criminal Justice System* 14 (1976)); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.").

special restrictions.[13]

Second, parole and probation are increasingly replacing the use of prisons as the primary method of punishing criminals,[14] in large part as a result of decreasing prison space[15] and escalating prison costs.[16] The total number of people under community supervision has risen dramatically in recent years. Over seventy-three percent of convicted criminals currently under sentence are on the

---

[13] *Griffin*, 483 U.S. at 874 ("To a greater or lesser degree, it is always true of probationers (as we have said it is true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

[14] *See* Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, 75 Prison J. 479, 480-81 (1995); Dale G. Parent et al., National Inst. of Justice, U.S. Dep't of Justice, *Responding to Probation and Parole Violations*, July 1994, at 1 (hereinafter "*Responding to Probation and Parole Violations*").

[15] Prison populations have increased dramatically leading to a serious overcrowding problem. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, *Correctional Populations in the United States, 1995* (May 1997), at 5 (hereinafter "Bureau of Justice Statistics") (121 percent increase in prison populations from 1985 to 1995); *see also* Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. Rev. 151, 152 (1997) (discussing problem of prison overcrowding).

[16] Nationally, the total spent on corrections in fiscal year 1995 exceeded $21 billion, three times the expenditures from the early 1980s. *See* Mark A.R. Kleinman et al., BOTEC Analysis Corp., Massachusetts Inst. for a New Commonwealth, *Criminal Justice in Massachusetts: Putting Crime Control First*, Oct. 1996, at 20 (hereinafter "*Crim. Justice in Mass.*").

streets under some type of community supervision.[17] In 1985, approximately 2.3 million people were under community supervision. By 1995, that number had increased to almost 3.8 million.[18]

Similarly, the increased reliance on community supervision means that more violent offenders currently under sentence live in our communities.[19] The number of people sentenced to community supervision in lieu of prison for commission of a violent crime, that is, homicide, sexual assault, robbery, and assault, jumped forty-five percent from 1989 to 1993.[20] Also, offenders on parole and probation often are serial offenders, who commit a disproportionate number of violent crimes.[21]

Third, the objectives of community supervision are substantially similar to the objectives of prisons. Just as the limitation on the constitutional rights of prisoners is justified in prisons by the need to deter crime, rehabilitate prisoners, and maintain institutional security,[22] appropriate limitations are justified in probation and parole systems by the need to

---

[17] Ed Barajas, *Freeing the Invisible Giant*, State Gov't News, Aug. 1997, at 17.

[18] Bureau of Justice Statistics, *supra*, at 5, 38, 128.

[19] *See* Petersilia, *supra*, at 480-81.

[20] *See* John J. DiIulio, Jr., *Reinventing Parole and Probation*, Brookings Rev., March 22, 1997, at 40.

[21] *See* David Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449, 459-60 (1997) ("Much of our crime problem is due to serial offenders who commit a wide variety of offenses; consistently abuse alcohol and other drugs; . . . are often arrested, often on probation and parole, and often incarcerated.").

[22] *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

deter recidivism, monitor rehabilitation, and maintain community security.[23] "The fact that most active offenders are not in prison, but instead on probation or parole, means that these community corrections agencies are potentially central in a serious crime-control strategy." *Crim. Justice in Mass.*, *supra*, at 22.

Fourth, because of the explosive growth in the community supervision population, strict controls and effective oversight are needed to meet the objectives of community supervision. Probation and parole agencies need the authority to impose intensive supervision because, when supervision is not adequate, more crime occurs, rehabilitation fails, and recidivism increases. Failed parolees and probationers account for the fastest growing segment of the prison population and thirty to fifty percent of all new prison inmates,[24] escalating the vicious cycle that requires parole and probation as substitutes for prisons.

In sum, the explosive growth of the probation and parole systems in the United States over the past twenty years has led to the same type of "complex and intractable" problems that this Court recognized in the prison system and that led to the legitimate interests test for evaluating prison policies allegedly violating a prisoner's constitutional rights.[25] The running of a prison is "an inordinately difficult

---

[23] *See Griffin*, 483 U.S. at 875 ("[Probation] restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."); *Crim. Justice in Mass.*, *supra*, at 20 (goals of probation and parole include deterring recidivism, rehabilitating offender, and protecting community).

[24] *See* Petersilia, *supra*, at 482-83.

[25] *See Procunier*, 416 U.S. at 405.

undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85. It is hard to imagine a better description of the running of a modern community supervision system, and therefore the Court should apply the legitimate interests test in the community supervision context as well.

2. *The Same Prudential Reasons That Led to the Adoption of the Legitimate Interests Test in the Prison Context Apply to Community Supervision Programs.*

The Court also has had several prudential reasons for applying the legitimate interests test to prison regulations. The same prudential considerations urge application of the test to parole and probation.

First, the Court has sought to grant prison officials appropriate deference to ensure that they had discretion to adopt innovative solutions without fear of judicial interference.[26] Parole and probation authorities need the same deference and discretion to provide innovative and effective community supervision. For example, in appropriate cases, they should be free to adopt a practice of requiring routine polygraph testing or questioning without the threat of Fifth Amendment challenges. They should also be able to force sexual predators on parole or probation to refrain from owning pornography despite alleged First Amendment concerns. Subjecting these and other conditions to rigorous

---

[26] *See O'Lone*, 482 U.S. at 349-50.

constitutional scrutiny would undermine the ability of authorities to fulfill their obligation to protect communities.

Second, the Court has adopted the legitimate interests test in prison cases to clarify the discretionary authority of prison officials and end the burgeoning litigation of constitutional claims by inmates.[27] According the proper deference and discretion to parole and probation officials similarly would allow the courts to avoid a series of cases alleging comparable claims.

B. The Legitimate Interests of Community Supervision Require Intensive Monitoring, Including Policies of Conducting Warrantless, Suspicionless Searches of Supervisees.

In this part of the brief, we first explain that the legitimate interests test may be applied to a supervisee's Fourth Amendment claim. Next, we discuss the four-factor approach the Court has developed to apply the legitimate interests test to official prison conduct and the ways to adapt that approach to probation and parole cases. We then apply the factors to warrantless, suspicionless searches to show that such searches are reasonably related to the legitimate interests of community supervision.

The legitimate interests test can and should be used to review Fourth Amendment as well as other constitutional claims asserted by a parolee or a probationer. Although

---

[27] *See Bell v. Wolfish*, 441 U.S. 520, 523 (1979) (noting that Court had "several decisions consider[ing] constitutional challenges to prison conditions or practices by convicted prisoners" in previous five terms).

Fourth Amendment issues do not arise in prison cases,[28] they do arise in community supervision cases because, under *Griffin*, "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 483 U.S. at 873. *Griffin* applied the balancing test used to assess "special needs" situations, where the warrant and probable cause requirements are impracticable, such as a state's operation of a school or a government office or its supervision of a regulated industry.[29] CCI and the crime victim groups believe, however, that a more deferential standard of review, the legitimate interests test, should be applied to determine what is reasonable under the Fourth Amendment in the community supervision context.[30]

1. *The Court Should Adapt the Factors Used in Applying the Legitimate Interests Test in Prison Cases to Community Supervision Cases.*

The factors used to apply the legitimate interests test to prison regulations and policies should be used, with appropriate modifications, to evaluate constitutional challenges to official conduct in parole and probation cases. The *Turner* court set out four factors to use in evaluating whether a challenged regulation or policy is "reasonably

---

[28] *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (holding prisoner has no reasonable expectation of privacy in prison cell).

[29] *See Griffin*, 483 U.S. at 873.

[30] *Griffin*'s holding that the Wisconsin statute was constitutional under the "special needs" standard does not foreclose the possibility that the more deferential legitimate interests test should apply in this case.

related" to legitimate interests: first, whether a rational connection exists between the regulation or policy and the legitimate governmental interest invoked as a justification for the action; second, whether alternative means of exercising the right allegedly being infringed remain open for the inmate; third, whether accommodation of the right allegedly being infringed will have an adverse impact on guards, other inmates, and prison resources; and finally, whether obvious, easy alternatives to the regulation or policy exist.[31]

Although the factors are specific to "prisoner rights" litigation,[32] they provide substantial guidance on how to establish the "reasonably related" connection in community supervision litigation. The "rational connection," "alternative means," and "easy alternative factors" are all relevant in deciding whether a regulation or policy of a community supervision system is reasonably related to the legitimate interests of the system and therefore constitutional. The "adverse impact" factor is more specifically tailored to a prison setting, but could be adapted to involve an evaluation of whether the accommodation of a right will have an adverse impact on the relevant community.

Although prisons and community supervision systems have similar legitimate interests and courts should apply similar factors in evaluating whether a regulation or policy is reasonably related to those legitimate interests, this does not mean that a court would necessarily reach the same conclusion concerning the validity of a regulation or policy affecting prisoners and community supervisees. For example, in *O'Lone*, this Court held that a prison policy affecting the ability of Muslim inmates to attend religious services was

---

31 *Turner*, 482 U.S. at 89-90.

32 *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

reasonably related to legitimate penological interests.[33] It is less likely that a policy decision having a similar effect on a group of probationers or parolees would satisfy the "reasonably related" factors. The factors need to be applied on a case-by-case basis with the relevant differences between prisons and community supervision systems taken into account.

2. *Consideration of the Requisite Factors Demonstrates That a Policy Decision To Conduct Warrantless, Suspicionless Searches Is Reasonably Related to the Legitimate Interests of Community Supervision.*

A policy decision to conduct warrantless, suspicionless searches, when examined using the requisite factors, is reasonably related to the legitimate interests of community supervision. The essential premise is that effective community supervision programs require extremely close monitoring and control of probationers and parolees.[34] Thus, a policy of conducting warrantless, suspicionless searches has a compelling, and not merely a rational, connection to the legitimate interests of community supervision.

"The key concept in community corrections is

---

33 482 U.S. at 353.

34 *See, e.g.*, Petersilia, *supra*, at 488 (noting "emerging consensus" on moving toward intensive supervision in monitoring of community supervisees); Ed Barajas, *Community Justice: Bad Ways of Promoting a Good Idea*, Perspectives, Summer 1997, at 18 (noting need for intermediate sanctions).

'intermediate sanctions,' programs that provide more intensive supervision—more punishment, more control, and perhaps more rehabilitation—than conventional probation or parole, but cost less than imprisonment." *Crim. Justice in Mass.*, *supra*, at 22-23. Intensive supervision is a flexible concept, generally providing for a wide variety of rigorous conditions aimed at closely monitoring the daily activities of the supervisees.[35]

"[S]olid empirical evidence" proves the benefits of intensive supervision.[36] Programs involving strict conditions, intensive surveillance, and mandatory treatment have proven effective in lowering recidivism.[37]

As more states and localities have recognized the need for intensive supervision programs, they have begun to implement these programs to meet the goals of community supervision. The most innovative and successful of these programs use warrantless, suspicionless searches to oversee the activities of their supervisees.

For example, Oregon has developed a program called

---

[35] *See* Joan Petersilia & Susan Turner, *Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment*, May 1993, at 1.

[36] *See* Petersilia, *supra*, at 489.

[37] *See id.*; Todd R. Clear & Anthony A. Braga, *Community Corrections, in Crime* 421, 427 (James Q. Wilson & Joan Petersilia eds., 1995). Although some studies have shown that intensive supervision programs have on occasion failed to meet their stated goals, more recent studies have concluded that the programs generally failed because governments did not commit the requisite resources to administer the programs effectively. *See* Petersilia, *supra*, at 489; National Inst. of Justice, U.S. Dep't of Justice, *Impact of Systemwide Drug Testing in Multnomah County, Oregon* (June 1995). Thus, what were intended to be intermediate sanctions, in practice, did not provide any more surveillance than traditional community supervision. *See* Petersilia, *supra*.

"Drug Reduction on Probation" based on the use of frequent, random drug testing as an effective monitoring tool.[38] Oregon combines drug testing with automatic short and immediate jail stints for failed tests.[39] "Practitioners believe that the [program has] reduced the number and rate of third and subsequent failed drug-use tests." *Responding to Probation and Parole Violations*, *supra*, at 19. One county reported that the program reduced the percentage of positive random drug tests from sixty-one to fifteen percent.

Localities in Boston have implemented two innovative programs to stop crime among gang members by targeting known offenders under supervision with intensive surveillance. Operation Ceasefire began in 1996 as an attempt to intervene in gang areas with recent histories of violent homicides.[40] The strategy, in part, uses various surveillance methods by community supervisors, including frequent home visits and random stops, to create a "heavy police presence."[41]

Similarly, Operation Night Light, a connected program, coordinates the efforts of community supervisors and police to ensure that juveniles under community supervision obey the conditions of their supervision.[42] Supervisors use random home visits to look for the individual, area inspections, and random spot searches to

---

[38] *See Responding to Probation and Parole Violations, supra,* at 19.

[39] *See id.* at 20.

[40] *See* Kennedy, *supra*, at 463.

[41] *See id.*

[42] *See* Ronald P. Corbett et al., *Operation Night Light: An Emerging Model for Police-Probation Partnership, Invitation to Change: 1996 Better Government Competition on Public Safety* 105, 109 (1996).

control their supervisees' activities.[43]

The success of these Boston programs has been dramatic. In the short time the programs have existed, youth violence in Boston has dropped significantly.[44] President Clinton noted the merits of Boston's creative solutions to violence, saying "[w]e want to give every city the tools to do what Boston has done." *Boston's 'Magic' Formula*, Boston Herald, Feb. 20, 1997, at O24.

Another effective program using intrusive methods of surveillance monitors sexual predators on lifetime probation in Arizona. This program uses periodic polygraph tests, home searches, and plethysmorgraph testing to monitor the probationers. The continuous observation of these offenders has led to a remarkably low recidivism rate of 1.4 percent.[45] Other jurisdictions view Arizona's approach as a model to follow.[46] The success of all of these innovative programs depends upon the ability to use intrusive surveillance, demonstrating the necessary rational connection between warrantless, suspicionless searches and the legitimate interests of community supervision systems.

Two other factors in the "reasonably related" test also indicate that warrantless, suspicionless searches are reasonably related to the legitimate interests of community supervision. Not allowing warrantless, suspicionless searches of a supervisee's home would have an adverse impact on the

---

[43] *See id.* at 111, 114.

[44] For an in-depth look at Operation Night Light and its success, see *Operation Night Light, supra*. A complete description and discussion of Operation Ceasefire can be found in Kennedy, *supra*, at 463-68.

[45] *See* Karine Bland, *Arizona Tough on Child-Sex Offenders, New Law Allows Life Sentences*, Ariz. Republic, Apr. 21, 1997, at A1.

[46] *See id.*

community, as demonstrated by the successful lowering of recidivism rates accomplished by the programs utilizing the warrantless, suspicionless searches described above. In addition, there are no easy alternatives to a home search for determining many types of violations of supervision conditions. As the Ninth Circuit stated in upholding warrantless, suspicionless searches of parolees' homes:

> [I]t may be impossible to determine whether a parolee is using alcohol or narcotics, whether he is keeping weapons or contraband in his home, whether he is using or preparing to use his home as a base for improper or unlawful activities, whether he is making a real effort to obtain employment, or the general nature of his home environment, without conducting some type of search."

Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir. 1975) (*en banc*). The element of surprise and the deterrence effect created by suspicionless searches are extremely important aspects of a successful monitoring program.

The final factor, whether alternative means for exercising the right remain open to the community supervisee, is difficult to apply in the Fourth Amendment context because the constitutional right provides that a person cannot be searched in certain circumstances. This means that it is unlikely that a person has an alternative method of exercising a Fourth Amendment right when officials need to conduct a search in a particular manner and do not have an easy alternative consistent with the purposes and policies of the community supervision program. Nonetheless, as long as a warrantless, suspicionless search is pursuant to and part of a valid community supervision system, overall consideration of the four factors indicates that the search is reasonably related

to legitimate parole interests.

As in *Griffin*, the appropriate Fourth Amendment protection for community supervisees is that searches be "reasonable." The legitimate interests test gives probation and parole officials more flexibility to define what is reasonable and confirms that warrantless, suspicionless searches in accordance with the policies and objectives of a community supervision program are reasonable under the Fourth Amendment.

C. The Warrantless, Suspicionless Search of Scott's Residence Satisfies the Legitimate Interests Test.

We now apply the legitimate interests test described above to the search of Scott's residence. As the prison cases show, the test can be applied to a parole policy decision as well as a formal parole regulation. The Court has acknowledged that both the "policies and practices" of prison administrators should be accorded considerable deference.[47] Although *Turner* addressed prison regulations promulgated by the Missouri Department of Corrections, the Court suggested that the legitimate interests test applies to all prison regulations or policies, including the "day-to-day judgments of prison officials." 482 U.S. at 89. Several lower courts have agreed that the standard of review should be applied to all actions taken by prison officials.[48] In *Lane v. Griffin*, 834

---

[47] *See Bell*, 441 U.S. at 547.

[48] *See also Schenk v. Edwards*, 921 F. Supp. 679, 684 (E.D. Wash. 1996) (written or unwritten prison policy prohibiting certain inmate interaction subject to legitimate interests test); *Frink v. Arnold*, 842 F. (continued...)

F.2d 403 (4th Cir. 1987), Justice Powell sitting by designation stated:

> The fact that the restriction at issue here arose from a policy decision made by the superintendent of the prison, rather than a regulation, does not require a different analysis. . . . [T]he reasons articulated by the Court in *Turner* and *O'Lone* for applying a 'reasonably related' standard to prison regulations apply with equal force to a policy decision made by a prison official.

Id. at 406 (upholding restriction on ability of inmate to offer religious service). Just as in the prison context, policy decisions by parole officials should also be subject to the legitimate interests test.

The search of Scott's residence by state parole officers was pursuant to a policy of the Pennsylvania parole system. The Board authorized both the inclusion of the search consent as a condition of the terms of Scott's parole and the subsequent warrantless, suspicionless search of Scott's residence. As noted by the Supreme Court of Pennsylvania, "the General Assembly has given the Parole Board broad powers to supervise a parolee and to impose regulations on a parolee's conduct upon release that the Commonwealth could not impose on ordinary citizens." *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (Pa. 1997). The applicable Pennsylvania statute states that, "[i]n addition to the power to make general rules and regulations hereby granted, the [Parole] board may . . . prescribe special regulations for

---

[48] (...continued)
Supp. 1184, 1188 (S.D. Iowa), *aff'd*, 43 F.3d 673 (8th Cir. 1994) (applying legitimate interests test to unwritten prison policy governing inappropriate writings).

particular parolees." 61 Pa. Cons. Stat. § 331.23 (1996). A parolee must abide by any conditions imposed by the Parole Board and a violation of the conditions may cause his detention or return to a correctional institute. 37 Pa. Code §§ 63.3, 63.5(a).

As part of its special regulations power, the Board included the search consent as one of the conditions in its pre-printed "Conditions Governing Parole/Reparole" form. J.A. 7a. A prisoner could not go on parole without agreeing to the conditions.

As Agent Mundro testified at Scott's parole revocation hearing, the agents' understanding of their search powers under the special condition were that Scott's approved residence could be searched without his permission. *Scott v. Pennsylvania Bd. of Probation and Parole*, 668 A.2d 590, 595 (Pa. Commw. Ct. 1995). At the time of the search of Scott's residence, Pennsylvania had no controlling legislative, administrative, or judicial precedent limiting a reasonable search of a parolee conducted pursuant to a consent condition other than the limitation that a search be in connection with verifying and effectuating compliance with the conditions of parolee. As evidenced by the facts in this case, the Board and its agents, as a matter of policy and practice, defined "reasonable" to include without reasonable suspicion.

The Board's decision to use its special conditions power to create a search consent condition allowing for suspicionless searches is exactly the type of policy decision that courts have subjected to the legitimate interests test in prison cases and therefore is entitled to deference here. As explained in Section II(B), a warrantless, suspicionless search of a parolee conducted pursuant to a parole policy or regulation is reasonably related to the legitimate interests of a parole system. The search of Scott's residence satisfied these

requirements, was reasonable, and did not violate the Fourth Amendment. The Court therefore should hold that the evidence of Scott's parole violation was lawfully obtained.

III. EVEN IF THE COURT DOES NOT ADOPT THE LEGITIMATE INTERESTS TEST, THE SEARCH OF SCOTT'S RESIDENCE WAS REASONABLE UNDER THE FOURTH AMENDMENT.

Even if the Court declines to adopt the legitimate interests test, it still should find that the search of Scott's residence pursuant to Scott's search consent was constitutional under *Griffin*'s balancing test. For the reasons discussed in Section II of this brief, the state's need for effective methods to solve the problems of community supervision far outweighs the limited expectation of privacy held by probationers and parolees. Consented searches without reasonable suspicion satisfy the reasonableness requirement of the Fourth Amendment in the context of community supervision even if the legitimate interests test is not applied to parole cases. We defer to the fuller discussion of this argument and related points in the brief of the Board and the brief for the United States as amicus curiae.

CONCLUSION

For the foregoing reasons, the Court should decide that the Board's search of Scott's residence did not violate his Fourth Amendment rights and that the evidence obtained during the search was not required to be excluded from his

parole revocation hearing. It therefore should reverse the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

Of Counsel
ROGER L. CONNER
Center for the Community Interest
Suite 800
919 18th Street, N.W.
Washington, D.C. 20006
(202) 785-7844

ANDREW N. VOLLMER
Counsel of Record
MICHAEL PLOTNICK
LYLE ROBERTS
TODD ZUBLER
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

January 9, 1998